

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY E. PONCE,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

No. 1:21-cv-01727-JLT-HBK

ORDER REQUIRING PETITIONER TO
SUBMIT SIGNED DECLARATION

ORDER GRANTING PETITIONER LEAVE
TO AMEND RESPONDENT

TWENTY-ONE DAY DEADLINE

On December 6, 2021, Petitioner filed a handwritten petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1). Although not on the form approved for use, the handwritten petition identifies the ground(s) for relief upon which petitioner challenges his state conviction and sentence for first-degree murder. (*See generally Id.*). However, upon a close examination of the petition, the Court has discovered that the petition does not contain an original signature or name a proper respondent. Petitioner will be granted an opportunity to cure these deficiencies.

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

1 A petition for habeas corpus should not be dismissed without leave to amend unless it appears
2 that no tenable claim for relief can be pleaded were such leave granted. *Jarvis v. Nelson*, 440
3 F.2d 13, 14 (9th Cir. 1971).

4 **I. Respondent**

5 Petitioner has failed to name a respondent. A petitioner seeking habeas corpus relief must
6 name the officer having custody of him as the respondent to the petition. Rule 2(a) of the Rules
7 Governing § 2254 Cases; *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996); *Stanley v.*
8 *California Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994). Normally, the person having
9 custody of an incarcerated petitioner is the warden of the prison in which the petitioner is
10 incarcerated because the warden has "day-to-day control over" the petitioner. *Brittingham v.*
11 *United States*, 982 F.2d 378, 379 (9th Cir. 1992); *see also Stanley*, 21 F.3d at 360. However, the
12 chief officer in charge of penal institutions is also appropriate. *Ortiz*, 81 F.3d at 894; *Stanley*, 21
13 F.3d at 360. Where a petitioner is on probation or parole, the proper respondent is his probation
14 or parole officer and the official in charge of the parole or probation agency or correctional
15 agency. *Id.*

16 Petitioner's failure to name a proper respondent requires dismissal of his habeas petition
17 for lack of jurisdiction. *Stanley*, 21 F.3d at 360; *Olson v. California Adult Auth.*, 423 F.2d 1326,
18 1326 (9th Cir. 1970); *see also Billiteri v. United States Bd. Of Parole*, 541 F.2d 938, 948 (2nd
19 Cir. 1976). However, the Court will give Petitioner the opportunity to cure this defect by
20 amending the petition to name a proper respondent, such as the warden of his facility. *See West v.*
21 *Louisiana*, 478 F.2d 1026, 1029 (5th Cir. 1973), *vacated in part on other grounds*, 510 F.2d 363
22 (5th Cir. 1975) (en banc) (allowing petitioner to amend petition to name proper respondent);
23 *Ashley v. State of Washington*, 394 F.2d 125 (9th Cir. 1968) (same). In the interests of judicial
24 economy, Petitioner need not file an amended petition. Instead, Petitioner may file a motion
25 entitled "Motion to Amend the Petition to Name a Proper Respondent" wherein Petitioner may
26 name the proper respondent in this action.

27 **II. Signature**

28 Rule 11 requires all pleadings, written motions, and other papers be signed by at least one

1 attorney of record or by a party personally if the party is unrepresented. Fed. R. Civ. P. 11(a);
2 Local Rule 131(b). In addition, Rule 2 of the Rules Governing Section 2254 Cases requires a
3 petition for writ of habeas corpus to “be signed under penalty of perjury by the petitioner.”

4 In light of the difficulty in having Petitioner submit a new habeas corpus petition,
5 Petitioner is ORDERED to submit a document stating that he submitted the instant petition to the
6 Court and sign it under penalty of perjury. The document should contain an original signature.
7 Petitioner is GRANTED twenty-one (21) days from the date of service of this order to comply
8 with the Court’s directive.

9 Petitioner is forewarned that failure to comply with a Court order will result in dismissal
10 of the petition pursuant to Local Rule 110.

11 **ORDER**

12 Accordingly, Petitioner is GRANTED **twenty-one days (21)** from the date of service of
13 this Order in which to:

- 14 1. FILE a motion to amend the instant petition and name a proper respondent; and
15 2. SUBMIT a document stating that he submitted the instant petition to the Court, and
16 sign it under penalty of perjury.
17 3. The Clerk of Court is directed to provide petitioner with a blank petition for writ of
18 habeas corpus form labeled “Amended Petition” bearing this case number should
19 petitioner choose instead to submit a free-standing amended petition.¹

20 Failure to comply with this Order will result in a recommendation that the petition be
21 dismissed.

22
23 Dated: January 20, 2022


24 HELENA M. BARCH-KUCHTA
25 UNITED STATES MAGISTRATE JUDGE
26
27

28 ¹ The court’s acceptance of an amended petition should not be construed as a waiver of the one-year statute of limitations period set forth in 28 U.S.C. § 2244(d)(1).